United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL **77-7131**

To Be Argued By
DONALD F. MOONEY

United States Court of Appeals

FOR THE SECOND CIRCUIT

ATLANTIC & GREAT LAKES STEAMSHIP CORP.,
Plaintiff-Appellee,

against

STEELMET, INC.,
Defendant,

and

TIDEWATER TERMINALS, INC.,
Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York.

REPLY BRIEF OF DEFENDANT-APPELLANT

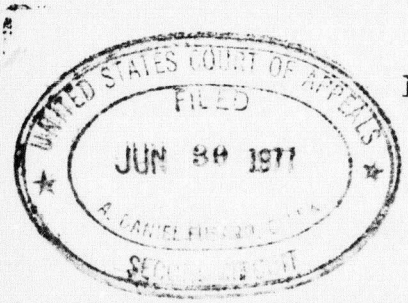

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TABLE OF CONTENTS

	PAGE
COMMENT ON APPELLEE'S STATEMENT OF FACTS	1
REPLYING TO APPELLEE'S POINT I	7
REPLYING TO APPELLEE'S POINT II	14
REPLYING TO APPELLEE'S POINT III	18
CONCLUSION	24

Cases Cited

Bonanno v. Tweedee Trading Co., 117 F. 991 (S.D.N.Y. 1902)	16
Britschgi v. McCall, 41 Cal. 2d 138, 257 P. 2d 977 (1953)	14
Empressa Maritima de Transportes v. Transatlantic, 1960 A.M.C. 1140 (S.D.N.Y. 1960)	16
Glassman v. Gerstein, 10 A.D.2d 875 (2d Dept. 1960)	15
Interocean Shipping Company v. National Shipping and Trading Corporation, 523 F.2d 527 (2d Cir. 1975)	8
Intercontinental Transp. Co. v. India Supply Mission, 261 F. Supp. 757, 1967 A.M.C. 369 (S.D.N.Y. 1966)	21, 23
Kaye Steam Navigation Company, Ltd. v. Barnett, Ltd., 41 Lloyd's L.R. 231 (1931)	19
Liberty Navigation & Trading Co., Inc. v. Kinoshita & Co., Ltd., Tokyo, 285 F.2d 343, 1963 A.M.C. 1902 (2d Cir. 1960), cert. den. 366 U.S. 949 (1961)	20
Pool Shipping Co. v. Samuel, 200 F. 36 (3d Cir. 1912)	21
Reinert v. Lawson, 113 S.W. 2d 293 (Tex. Civ. App. (1938)	15

PAGE

Wilamete Trans. v. Mobile Mar. Trans., 1973 A.M.C. 1633 16

United Transp. Co. v. Berewind-White Coal-Mining Co., 13 F.2d 282 (1926) 19

Statute Cited

Liberian Maritime Law:

Sec. 50 5

Other Authorities Cited

Burke, Voyage Charters-Special Problems, 49 Tulane Law Review 935 (1975) 22

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p. 211 22

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Comment on Appellee's Statement of Facts

In its brief Atlantic concludes that the brokers agreed to "all of the important terms of the contract" on November 20th. (Appellee's Brief, p. 3). This allegation ignores the evidence. On November 20th, the date of the alleged "fixture" telex (A. 148a), there still remained open the receivers approval which had to be given "latest 1600 hours Nov. 21" and negotiation of many vital details in the Genjapscrap form charter party. (*See, e.g.*, A. 10a, 12a, 146a, 150a, 162a, and 164a). It is ludicrous to assume that the terms contained in this form of charter party were merely unimportant surplusage.

Substantial matters affecting the prospects of profit and loss on the voyage and the rights of the parties still had to be worked out, including the strike clause, the stevedore damage clause, the lien clause, and the extra insurance clause. (Appellant's Brief, pp. 28-30). Mr. Pettersen, Atlantic's broker, felt compelled to pick up a copy of the ATLANTIC FREEDOM charter party at Steelmet's offices on the afternoon of November 21st, *the day after* the telex in question was sent, and the day after the District Court held that a contract was concluded. (Appellant's Brief, p. 18). His purpose was admitted to be to review and as necessary negotiate, alter, delete or add to the form to suit the negotiations and ultimate bargain of the parties. (Appellant's Brief, p. 18).

In fact Atlantic admits that no approval was given with regard to the terms of the Genjapscrap form charter party *until November 21st*. (Appellee's Brief, p. 5), contradicting the District Court's holding that a contract was concluded on November 20th. (A. 142a). Moreover, Atlantic's broker admitted that he was concerned about the insurance clause in the charter and that he had to take it up with Atlantic. Atlantic is incorrect in alleging that Mr. Pettersen informed Tidewater that his principal had agreed to all of the terms of the Genjapscrap form.

Mr. Traa testified as follows:

> "Q. And the next day did you not discuss the terms of that Genjapscrap with Mr. Pettersen?
>
> A. No, we didn't get into the details at all because we were trying to get the subreceivers approval sorted out.
>
> Q. On November 21st, the day after you sent your Telex, didn't you discuss the details of the Atlantic Freedom Genjapscrap charter with Mr. Pettersen?

A. No, because I think he only got it late in the afternoon if I am not mistaken." (A. 100a)

Atlantic next argues that the condition "sub-receivers approval" was not a true condition because Tidewater has not adequately explained why the receiver's approval was necessary, alleging that the sales contract was on an C&F basis. Apparently the Court below agreed with Atlantic on this point. However, as we have already pointed out (Appellant's Brief, pp. 15-16), *the reason why* this condition precedent was placed in the telex is not a material consideration. Both parties agreed to it and it was accepted that it was a condition. Furthermore, Mr. Avraamides noted that since scrap is a "very difficult cargo to discharge" (A. 24a), receiver's approval is customarily sought, and that the purchase order, (A. 176a), did not permit "use of ships with characteristics unsuitable for the cargo". (Appellant's Brief, pp. 5, 16). There was a reason that this condition was put in the telex of November 20th, and Atlantic and Tidewater agreed that it was a condition. The District Court erroneously rewrote the contract by "lifting" this subject, when Atlantic admitted that it remained to be "lifted".

In questioning the necessity for obtaining receiver's approval of the MARY, Atlantic chooses to ignore the fact that *it too actively sought the receiver's approval.* (Appellant's Brief, pp. 6, 17, 20). Although Atlantic alleges that Mr. Pettersen was first advised that the receivers had turned down the vessel on November 26th, it is clear from the record that both Mr. Pettersen and Mr. Kerwin were aware that the receivers had not approved the MARY on November 21st, and telexed Atlantic's agents in Peru in an effort to obtain this approval. (Appellant's Brief, pp. 5, 6).

It is alleged by Atlantic, (Appellee's Brief, p. 6), that Tidewater offered "the MV MARY *and* the MS PROME-

THEE", implying that they were offered simultaneously. This is patently false and ignores the testimony of Mr. Avraamides that first the MARY was offered, and then, only after the representatives of the receiver inquired whether any other vessels were available, the PROMETHEE was offered. (Appellant's Brief, pp. 5, 6 and 26).

In its brief Atlantic states that Mr. Avraamides "misrepresented" to the receiver's representatives at the time of their meeting that the receiver would be obligatd to pay a penalty for extra insurance on the MARY, when in reality such penalty under the Genjapscrap pro forma charter party was for the account of the owner (Appellee's Brief, p. 6). At the time of the meeting on November 21st or 22nd, Mr. Avraamides had no way of knowing that the owners had agreed to the extra insurance clause in the ATLANTIC FREEDOM charter party, since Atlantic had not informed him of this development. (A. 69a, 79a, 85a and 100a; Appellant's Brief, pp. 19-20). In fact Mr. Avraamides testified that "*usually this clause is never accepted by the owners* and we never reach (sic) negotiations for that clause yet." (A. 79a). Based on his experience and the information he had at the time of the meeting it was definitely not a "misrepresentation" on his part to warn the receiver's representatives that they might well incur an insurance premium if they chose the MARY. The fact that the Genjapscrap form placed this obligation on owners is not conclusive, since as hereinbefore noted standard charter forms are merely a convenient starting point from which the parties negotiate, and the final agreement, after substantial alteration, differs markedly from the original form.

Atlantic chooses to ignore the fact that at the time of the meeting, Mr. Avraamides also gave the characteristics of first the MARY and then the PROMETHEE. As is detailed in Appellant's Brief (p. 5 f.n. 1, p. 16 f.n. 2, 27-28), the PROMETHEE was clearly the superior vessel. She

was about 50% faster, she had more available hatches in order to facilitate discharge, she was a newer vessel (only seven years as against the MARY's seventeen years[1]) and thus there would be no imposition of an extra insurance premium due to her age, and she was a smaller vessel, her deadweight capacity closely matching that of the cargo, thus insuring greater suitability for discharge and stability for the vessel on the voyage. It is submitted that Atlantic has attempted to gloss over these significant facts, and that it was based on a comparison of the characteristics of the two vessels that Sider's representatives chose the PROMETHEE. Although Mr. Avraamides gave his opinion that the MARY was rejected because of her age, it must be emphasized that this is his *opinion*. Atlantic had a full opportunity to propound cross-interrogatories to Mr. Zegarra on this point, but did not. Tidewater submits that based on the above facts, the PROMETHEE was chosen on the basis of her superiority.

Atlantic now turns to the allegation that Mr. Avraamides "misrepresented" the ETA of the MARY. Mr. Avraamides is quoted out of context, (Appellee's Brief, p. 6), giving rise to the implication that he told the receivers that the MARY's ETA was December 9th. In point of fact, however, Mr. Avraamides testified as follows:

> "Q. Would you describe the meeting you had with these two gentlemen?
>
> A. I was in my office and Mr. Waisfisz called me into his office where he had these two representatives, and they asked me through an interpreter if I had any ship for their material. I said yes, I have a ship. *I gave them the details of the* MARY, *the lay days which was November 27, 28, December 9.*" (A. 70a). (Emphasis added).

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[1] Indeed the MARY was approaching the end of a merchant vessel's useful life which is generally considered to be 20 years. Thus for example a vessel over 20 years is not eligible for Liberian registration. §50 Liberian Maritime Law.

It is obvious that at the trial when Mr. Avraamides stated that he "gave him the lay days which was (sic) constituting December 9 . . ." (A. 70a), he meant that December 9 was the last lay day and not the ETA of the MARY. At the time of the meeting Tidewater could not give the Sider representatives an arrival time for the MARY because Atlantic had not guaranteed any arrival date in the November 20 telex. Tidewater was in a position wherein it could give only the estimated lay days. In fact, Tidewater had heard rumors that Atlantic was under pressure to drydock the MARY at Jacksonville for an overdue annual survey before tendering the ship to them (Kerwin deposition, pages 95-97). Obviously, Mr. Avraamides did not want to give an ETA on the vessel when he had no guaranty, and indeed doubts, that she could make it, and risk placing himself in an embarrassing situation with the customer. So instead he played it safe and gave the receiver the full spread of lay days/cancelling dates that Atlantic had given him. It is submitted that this hardly constitutes "misrepresentation".

It was only *after* the receiver's representatives had rejected the MARY (thus making further negotiations regarding the Genjapscrap form details pointless), that Mr. Avraamides went ahead and chartered the PROMETHEE. Again it must be emphasized that Mr. Avraamides informed Mr. Traa that the receivers had not approved the MARY, and that *Mr. Traa relayed this information to Atlantic's broker* (A. 92a-93a).

Atlantic attaches great significance to the telex Mr. Avraamides sent to the receivers on November 26th (Appellee's Brief pp. 6-7). However, at the trial Mr. Avraamides explained that this was necessary because Atlantic was pressuring him to "get something in writing" with regard to the receiver's rejection of the MARY. (See Appellant's Brief p. 6).

With regard to the receiver's reply to Steelmet (i.e. "we can not decid(sic) on vessel which would carry the material"), (A. 168a), it must be emphasized that the receiver's opinion of their role in approving the vessel is not determinative of the issue of whether their approval was a condition precedent to the contract. (Appellant's Brief pp. 5, 16). Secondly, we have already explained that since Messrs. Molina and Zegarra had not yet returned to Peru, Sider's office at *Lima* was apparently unaware of the choice made by Sider's representatives who, incidentally, operated out of the *Chimbote* office. (Appellant's Brief, p. 6). The fact remains that Tidewater felt the receiver's approval was necessary (Appellant's Brief, pp. 5, 16) and so it was included as a condition precedent in the telex of November 20th. It is clear that Atlantic, by its words and conduct (Appellant's Brief, pp. 18-20) considered it a material condition as well, and Atlantic attempted to obtain such approval before the expiration of the deadline (extended to 1600 hours on November 22nd) but was unable to do so. The *intent of the parties* to the agreement is material, not the opinion, after the fact, of a non-party.

Replying to Appellee's Point I

It is Atlantic's contention that the parties' respective brokers, who had the authority to bind their principals, agreed to all of the important details of the Genjapscrap form charter party as of November 20th. This position not only contradicts the evidence, but also prior admissions that Atlantic has made in the course of this action.

At p. 8 of Appellee's Brief it is implied that the brokers had the authority to bind their principals to a charter. The record belies this contention. At his deposition Mr. Avraamides testified that Mr. Traa had no authority to bind Tidewater to a contract. (A. 22a). Atlantic's counsel

declined to cross-examine Mr. Traa on this point. That Mr. Pettersen did not consider his "flexible" authority to mean he could bind Atlantic to a charter without its prior approval on all of the details of the Ganjapscrap form charter is clearly evidenced by his conduct. (Appellant's Brief, pp. 18-19). Obviously, if he felt compelled to obtain the ATLANTIC FREEDOM charter and consult with Atlantic on November 21st in order to get approval of the Genjapscrap details, and in particular the extra insurance premium clause, then it is clear that he was not authorized to bind his principal on November 20th.

In analyzing the telex of November 20th, (A. 148a), Atlantic's counsel has stressed "we confirm having fixed today as follows . . ." and ignored the rest of that telex in an attempt to compare this case with the *Interocean* case. A careful reading of the entire telex, particularly the closing sentence, ("negotiations and *eventual fixture* to be kept strictly confidential"), shows that the parties did not consider this telex to constitute a contract and that this case is distinguishable from the *Interocean* case. (Appellant's Brief pp. 8-9, 16-17). It should be emphasized that Mr. Pettersen testified that a prior counter-offer of Tidewater contained the same stipulation, (i.e. eventual fixture to be kept strictly confidential). The reference to "eventual fixture" in counter-offers with not two but three subjects reflected the recognition by the parties that a fixture had not yet been made. Then, when Atlantic arranged to lift one of the three subjects (approval of hatch sizes) one subject had been lifted and two remained. When this phrase reappeared in the telex of November 20th the fair interpretation is that the parties continued to recognize that the ultimate fixture had not yet been made, but was still pending the lifting of the remaining two subjects. (Appellant's Brief, pp. 16-17).

In this regard, although Atlantic stresses that this case falls within the four corners of the *Interocean* case, Tidewater has already dealt with this argument at length in its Main Brief (pp. 20-26, see particularly bottom of page 21 and page 22 as to difference between "filling in the blanks" of the Mobil charter form with the terms already negotiated in the *Interocean* case—an impossibility in the case at bar since there were no blanks in the Genjapscrap charter (A. 150a) and the terms had *not* been negotiated). Atlantic has also chose to disregard the testimony of its own broker in the negotiations that the phrase "confirm having fixed" meant that the telex was a mere ". . . *confirmation of the negotiations we had up until that moment*" (emphasis added) (A. 35a). Similarly Mr. Traa testified that the November 20th telex was only to "*confirm what had been agreed up to that.*" (A. 92a). (See Appellant's Brief, p. 10). It is important to note that Mr. Pettersen and Mr. Traa gave this testimony in response to questions regarding the meaning they gave to the specific telex in question. Mr. Pettersen gave the testimony quoted by Atlantic at p. 10 of its Brief in response to a general question as to the understanding of the word "fixed." It is submitted that the testimony of both brokers with regard to the particular language of the November 20th telex, bearing in mind the context in which said language was used, is of far greater weight in determining the intent and understanding of the parties than a broad question put to Atlantic's broker regarding his understanding of the meaning of the naked word "fixed".

Although Atlantic contends that the credibility of the witnesses was an issue with respect to the understanding of the November 20th telex, it must be pointed out that the *identical testimony* of both Atlantic's and Tidewater's brokers is to the effect that the telex was merely a confirmation of what had been agreed by the parties *up until that point.* Therefore, Tidewater fails to see

the significance of raising the issue of credibility, since no matter which witness the Court chooses to believe, the testimony is the same. Moreover credibility is not pertinent to the interpretation of the telex since this is essentially a legal question.

Returning to the second condition precedent of the telex i.e. the subject of receiver's approval, Atlantic takes the position that Tidewater "assumed a duty to bring about performance and were under a duty not to prevent such performance." This will be dealt with in Point II of this Reply Brief.

Tidewater's chief contention in Point I is that the trial court was correct in its holding that the receiver was never asked to approve the MARY. (Appellee's Brief, p. 11). To support its contention Atlantic argues from the testimony of Mr. Zegarra, one of the receiver's representatives who attended the meeting with Tidewater, which we shall comment on momentarily. However, it must first be noted that Atlantic has chosen to ignore the direct, uncontradicted testimony of Mr. Avraamides that the receiver was first given the characteristics, lay days/cancelling days and age of the MARY, and only when the receiver asked whether another vessel was available was it informed of the PROMETHEE. (Appellant's Brief, pp. 26-28). Instead Atlantic chooses to rely entirely on its interpretation of the Zegarra deposition (A. 14a-17a). It contends that Messrs. Zegarra and Molina were never asked to chose a specific vessel nor did they do so, but that they only asked for whatever vessel would arrive first in Chimbote. It should be emphasized, however, that Mr. Zegarra's answers must be viewed in the context of the general questions asked of him:

> "Q. . . . Please describe fully and completely the conversation with Mr. Avraamides concerning the selection of a ship that carries Sider Peru's cargo?
>
> * * *

> Q. Specifically did Mr. Avraamides tell you and Mr. Molina that two ships were available to carry the cargo?
>
> * * *
>
> Q. Specifically did you or Mr. Molina tell Mr. Avraamides to ship the cargo aboard the vessel which would arrive first in Chimbote?" (A. 16a-17a).

Nowhere did Mr. Zegarra state that he was not asked to accept the MARY. It is worthy of note that Atlantic had the opportunity to propound cross interrogatories to Mr. Zegarra with regard to this issue, but did not. It must also be remembered that Tidewater's counsel was operating under the limitations attendant with the use of interrogatories in that he did not have the opportunity to ask further questions in order to elicit testimony from Mr. Zegarra regarding further specifics of the conversations at the meeting.

The allegation that Tidewater is "withholding the testimony of Mr. Molina" is patently absurd. (Appellee's Brief, p. 13). There were two representatives from Sider present at the meeting, and Tidewater's trial counsel simply chose to propound the interrogatories on one of them. We fail to see what significance can be attached to choosing one of the representatives as opposed to the other. Doubtless if the questions had been directed toward Mr. Molina, Atlantic's counsel would now be alleging that Tidewater was hiding the testimony of Mr. Zegarra.

Atlantic next repeats its argument that Mr. Avraamides misrepresented that the MARY would entail a penalty of extra insurance for the receivers. (Appellee's Brief, pp. 13-14). Again we must point out that at the time he met with these receivers, Atlantic had not informed him that they were willing to accept the Genjapscrap provision calling for owners to pay the extra premium, and it had

been his experience that owners normally objected to this payment. Therefore Mr. Avraamides did not have the knowledge or intent that are requisite elements of a misrepresentation. Indeed Atlantic's broker confirmed that this was a clause that had to be checked out with his principals.

Regarding the vessel's arrival dates, Mr. Avraamides gave an ETA for the PROMETHEE which was a vessel under time charter to Tidewater and a vessel whose estimate he was in a position to give with a reasonable degree of certainty as the "end of November." With respect to the MARY he gave the lay days (November 27, 28-December 9th) which had been furnished by Atlantic. He had no guaranty of that vessel's arrival date and as noted above had heard rumors that the vessel was first going into drydock. Rather than risk the embarrassment of giving the receivers a date for the MARY which he might not keep he simply gave the range of dates she was obligated to arrive at Jacksonville. Tidewater contends that this does not constitute a "misrepresentation".

Atlantic's reference to the loading date that Mr. Avraamides gave in the November 26th telex is immaterial since, as we have seen, his uncontradicted testimony was that this telex was sent *after* Sider's representatives had already made their deceision. Furthermore, the only reason this telex was sent was at Atlantic's insistence that they have something in writing.

As Tidewater pointed out in Point V of its brief (p. 30), the trial court was greatly influenced by "multiple hearsay" in reaching its finding that the receivers were not asked to approve, and did not disapprove the MARY. Besides our fundamental objection that any evidence with respect to the receiver's opinion of whether its approval was necessary or not with regard to the condition precedent of the November 20th telex is immaterial, the evi-

dence that was offered by Atlantic was the out-of-court statement of its agent in Peru, purporting to relate the out-of-court statement of the Lima office of Sider, Peru, thus constituting multiple hearsay. We noted that this evidence was accepted by the trial court "subject to connection" and that this connecting evidence was never offered. As "connecting evidence" Atlantic now refers to receiver's telex of November 28th (A. 168a) which is also hearsay. Tidewater fails to see how its telexes to receivers (A. 166a, 168a) or the testimony of Mr. Zegarra (A. 14a) provide any "connection" with the proffered admittedly hearsay evidence.

To summarize, it is Tidewater's position that whatever the trial court's opinion as to the credibility of the witnesses may have been, that this should not have been a controlling factor determining the issue in question. The issue was whether the receiver's approval was a condition precedent to the contract. The evidence is clear that the parties made it an express condition, and from both their words and conduct they acted on the basis that it was a condition. The opinion of the receiver, a non-party to the agreement, is not pertinent to the issue. There is nothing in the record to indicate that the receiver was not asked to approve the MARY, though Atlantic had every opportunity to pursue this line of questioning if they chose to propound cross interrogatories to Mr. Zegarra. Indeed, the cases cited in Atlantic's brief with respect to Tidewater's "concealing the testimony of Mr. Molina" are equally applicable to Atlantic's failure to pose a direct question to Mr. Zegarra with regard to whether he was asked to approve of the MARY or not. Tidewater therefore respectfully submits that the District Court was in error in concluding that receiver's approval was not a true condition and that said approval was never sought by Tidewater.

Replying to Appellee's Point II

Atlantic's second point is centered on the proposition that Tidewater had assumed a duty to bring about the condition precedent of the receiver approving the MARY and that acting in bad faith Tidewater hindered the receiver giving their approval. These contentions run contrary to the facts as well as to established principles of contract law.

It must first be noted that nowhere in the telex, nor anywhere in the record, does it appear that Tidewater assured Atlantic that the receivers' approval of the MARY would be forthcoming, or that they promised to obtain such approval.

In a recent appellate case in California, *Britschgi* v. *McCall,* 41 Cal. 2d 138, 257 P. 2d 977 (1953), the Court was asked to interpret a contract involving the sale of real property which was conditional upon the defendants first eliminating an encumbrance (by "buying out" a lessee at a specified price). Although defendants made an offer which was rejected, the plaintiffs alleged that defendants had breached a duty owed plaintiffs in that they did not negotiate with the lessee with enough diligence.

The California Court of Appeal rejected this agreement out of hand:

> "No fault may be ascribed to the defendants because of the unfulfillment of the condition precedent. The language of the condition and the parol evidence introduced in explanation thereof are devoid of any affirmative undertaking on the part of the defendants to fulfill the condition. The defendants were to convey only if they could eliminate the specified encumbrance, and there was no promise to eliminate or convey in any event. *An express condition precedent to performance by a party cannot be construed as imposing a duty on that party*

> *to fulfill the condition, where, as here, the language employed does not constitute an undertaking to do so.*" Edwards v. Billow, 31 Cal. 2d 350, 361, 188 P. 2d 748. (257 P.2d at 980). (emphasis added).

In *Reinert* v. *Lawson*, (Tex. Civ. App.) 113 S.W. 2d 293 (1938), the Texas Court of Appeals also refused to find an implied promise. In that case, a sale of a gin plant was made contingent on the closing of a pending deal between the buyer and a bank. The evidence showed that the "pending deal" was for the sale of a farm from the bank to the buyer and that the buyer, although offered the farm by the bank, refused to purchase it. The court said:

> "The stipulation under consideration, by its express term, made the closing of appellee's deal with the bank a prerequisite to the existence of any obligation on the part of appellee to perform his contract with appellant. It, therefore, contains the essential elements of a condition precedent. The pending deal between appellee and the bank had no direct connection with the contract between the parties hereto. It was an uncertain thing, which might or might not occur. *Making the closing thereof a condition precedent to liability on said contract did not imply any promise on the part of appellee or impose any duty on him to close such deal if he could.* 5 Page on Contracts, p. 4516, §2576, and authorities cited; Supplement thereto, vol. 2, p. 1813, §2576, and authorities cited; 1 Restatement Law of Contracts, p. 366 et seq., §257." (113 S.W.2d 294).

A New York appellate court has followed this rule. In *Glassman* v. *Gerstein*, 10 A.D.2d 875 (2d Dept. 1960), a contract to purchase real property called for the buyer to apply to a "lending institution" for a mortgage, and if financing was unobtainable, the contract would be cancelled. When the mortgage fell through, the seller offered

a purchase money mortgage. The Appellate Division affirmed the lower court's holding that the buyer was under no obligation to accept the seller's offer, and that the contract was cancelled.

It is submitted that the above-quoted authority is directly on point regarding Tidewater's "duty" to obtain receiver's approval. The November 20th telex did not call for *Tidewater* to obtain approval. In this respect it is interesting to note that Atlantic took it upon themselves, when the receiver's approval was not forthcoming on November 21, to obtain the requisite approval of Sider at which time a 24 hour extension of the deadline was arranged (Appellant's Brief, pp. 6, 17, 20; A. 92a). Clearly, it was neither the intent nor the understanding of either party that Tidewater bore the responsibility of obtaining the receiver's approval.

It is equally clear, however, that Tidewater made a reasonable effort to obtain said approval. The MARY was first offered to Sider's representatives at a meeting on November 21st or 22nd, her characteristics and laydays given, but the representatives inquired further about other vessels, were given similar data on the PROMETHEE, and chose her instead (pp. 4-5 *supra,* Appellant's Brief, pp. 5, 26-28).

Atlantic also alleges that Tidewater failed to act in good faith. In cases in which an admiralty court held that a party breached it implied obligation to act in good faith, the Court found that the wrongdoer's financial interest was best served if the charter fell through, and further that the wrongdoer took affirmative steps "far beyond the bounds of accepted commercial practice . . ." *Wilamete Trans.* v. *Mobile Mar. Trans.,* 1973 A.M.C. 1633 (intentionally ordering a ship to a destination it could not possibly reach); *Empressa Maritima de Transportes* v. *Transatlantic,* 1960 A.M.C. 1140 (S.D.N.Y. 1960), (intentionally delaying a vessel's discharge); *Bonanno* v. *Tweedee Trading Co.,* 117 F. 991 (S.D.N.Y. 1902), (*intentionally* obstructing a vessel's clearance through customs).

We must reiterate that it stands unrebutted that it was to Tidewater's best financial interest to engage the PROMETHEE in the lucrative end of season trading out of the Great Lakes during the period in question, but it held her in reserve to fulfill the Sider commitment in the event that the MARY was rejected. Clearly Tidewater would have much preferred to let the MARY fulfill this commitment. (Appellant's Brief p. 25). It was Mr. Avraamides' unrebutted testimony that the PROMETHEE which was under charter to Tidewater was "open" during the time in question, had to be kept open in order to cover the possibility that the receiver might reject the MARY, and that Tidewater was unable to utilize her in a lucrative voyage from the Great Lakes to Avonmouth, England which according to his testimony would have yielded an estimated net profit of $137,000.00 which is far in excess of the alleged net profit of $48,000 that Atlantic estimates the PROMETHEE made on the voyage to Chimbote. (Appellee's Brief, p. 21). Furthermore, there is nothing on the record to indicate that Steelmet or Tidewater had fixed the PROMETHEE for a voyage from Port Everglades to Egypt *prior to* the time of this dispute. Thus it stands unrebutted that the PROMETHEE would have earned a net profit of $137,000 had Tidewater not been compelled to keep her in reserve in the event that the receivers withheld their approval of the vessel MARY. Atlantic's alleged estimate of what the PROMETHEE actually earned on the Chimbote voyage simply confirms that it would have been in Tidewater's best interest to have the MARY fulfill its Chimbote commitment which is the reason it conducted the negotiations on the MARY.

Replying to Appellee's Point III

Atlantic objects to Tidewater's calculation of the estimated net loss which would have resulted had the MARY performed the Jacksonville/Chimbote voyage on the grounds that (1) Tidewater considered every conceivable adverse circumstance that the vessel might have encountered to its calculation; and (2) "that Atlantic misconstrued the relationship between laytime and estimated time in port." Atlantic is incorrect in both respects as a matter of fact and as a matter of law.

Atlantic alleges that Tidewater incorporated "the worst possible conditions at sea" (Appellee's Brief, p. 27), into its estimate of steaming time. This is incorrect. In fact Tidewater's calculation was based on *perfect weather,* thus giving Atlantic every benefit of the doubt. (Appellant's Brief, p. 40).

Atlantic further argues that its admission that the vessel maintained an *actual* speed of only 9.09 knots on an *actual* voyage from Mobile, Alabama to Matanzas, Venezuela at the approximate time she would have been performing the voyage contemplated in this dispute, (Appellant's Brief, p. 39), is inconclusive, since there is no record of weather or current conditions. This disregards Mr. Kerwin's testimony (A. 60a) that on a voyage south from the United States a vessel has a following current which would cause her speed to increase and thus the MARY should have performed at *better* than 11 knots on this voyage. The actual decrease in the MARY's speed of over 2 knots cannot be explained as due to adverse weather. Atlantic had every opportunity at the trial to introduce evidence to this effect, but did not.

With respect to estimated time at the loading and discharge ports, Atlantic insists that the charter stipulated amount of laytime and the charter stipulated exclusion of weekends, be ignored and that it be permitted to incorporate the *fastest possible* time for loading and dis-

charging into its port estimate. By ignoring such charter stipulations, Atlantic substantially reduces its estimated expenses and increases its net profits. (Appellant's Brief, p. 34).

Atlantic argues that it is entitled to do so relying on *United Transp. Co.* v. *Berewind-White Coal-Mining Co.*, 13 F.2d 282, 283 (1926) (i.e. ". . . if all had gone well", Appellee's Brief, p. 23), and presumes the vessel would have expedited loading to the maximum by working around the clock, on weekends, and even on Christmas and New Years Day. It contends that Tidewater may not assume that Tidewater would have utilized all of its allowed laytime in loading and unloading the MARY.

An English admiralty court was faced with this identical contention in *Kaye Steam Navigation Company, Ltd.* v. *Barnett, Ltd.*, 41 Lloyd's L.R. 231 (1931). Mr. Justice Branson held as follows:

> . . . But once you have the principle that in assessing the damages to be paid by a person who has broken his contract you must see that you do not impose upon him more than the minimum which he has contracted to give the plaintiff, *one cannot avoid the conclusion that, in calculating the loss of profit which a charterer who has broken his charter-party must pay the ship, any option which the charterer is given under the charter-party, the exercise of which by the charterer would reduce the profit which the shipowner could have earned, must be taken into account in assessing damages.*
>
> In my view, therefore, in assessing the damages for the purpose of getting at the amount of profit which the shipowners (the plaintiffs here) would have earned had this contract been carried out, whoever it is who has to determine it should take into account the fact that the charterers, if they had accepted the ship and proceeded to load the

> cargo, might have kept her for 33 days without breaking the contract, and without becoming liable for demurrage. (41 Lloyd's L.R. at 240) (emphasis added).

The foregoing principle has been followed by this Court in *Liberty Navigation & Trading Co., Inc.* v. *Kinoshita & Co., Ltd., Tokyo* (THE JOSEPHINA), 285 F.2d 343, 1963 A.M.C. 1902 (2d Cir. 1960), cert. den. 366 U.S. 949 (1961). In considering the estimated time the voyage there under consideration would have taken, this Court took into consideration days excluded from laytime under the governing charter, stating:

> . . . We must first consider how long the charter in fact would have taken and, if the answer is more than 37½ days, decide whether defendant is precluded by an alleged stipulation from asserting this.
>
> Under the charter defendant was entitled to take approximately 10¼ weather working days to load and 8½ to unload. *These 18¾ days would necessarily have included at least two Sundays on which defendant was not required to load. Addition of these brings up to a figure approximating the 21 days shown in the stipulation.* (1963 A.M.C. at 1906)

This Court rejected the plaintiff-shipowner's argument that the defendant-charterer should be allowed less than the stipulated laytime as follows:

> . . . Plaintiff urged to the contrary testimony contended to show that loading time would be 10 days including some good and same (sic) bad. In fact the testimony related to unloading. In any event, under the charter defendant had the right to take 10¼ weather working days to load; *it is immaterial whether it might have been able to load in*

> *less.* (1963 A.M.C. at 1907, f.n. 1) (emphasis added).

Finally, this Court expressly recognized defendant's right to show that the voyage would have taken longer *"if everything did not go well."* (1963 A.M.C. at 1907).

The cases above cited are a logical corrollary to the basic rule of the law of charter parties that a charterer is permitted the use of the entire laytime stipulated by the parties in the charter, and cannot be held liable for utilizing full laytime even if it could discharge the vessel at a rate faster than the stipulated rate. *Pool Shipping Co.* v. *Samuel,* 209 F. 36 (3d Cir. 1912); *Intercontinental Transp. Co.* v. *India Supply Mission,* 261 F. Supp. 757, 1967 A.M.C. 369 (S.D.N.Y. 1966).

Not only has Atlantic disregarded judicial precedent, but it has also misconstrued the practical function of the laytime clause. The laytime stipulated in a charter party constitutes the parties' best estimate as to the amount of time a vessel will require to load and unload. For reasons set forth below, it is in each party's best interest to set laytime to reflect the amount of time they *reasonably anticipate* the vessel will spend in port:

> This clause is of particular importance for both parties to the charter party because of it's direct effect on the timing of the enterprise. While the charterer is interested in a reasonably prompt delivery, the shipowner wants to complete each discharge as quickly as possible. Consequently, this clause is included in every voyage charter to establish a schedule of loading or discharge and agreed penalties for delays. (Vanderventer, *Analysis of Basic Provisions of Voyage & Time Charter Parties,* 49 Tulane Law Review, 807, 814-15 (1975).

Laytime has also been defined as follows:

> Laytime is the measure against which demurrage or dispatch payment is calculated, and it is also a component of freight. For example, *when calculating the estimated voyage, the shipowner takes into account* the characteristics of his vessel, the nature of his cargo, the loading and discharging facilities of the ports, and *the probable number of days the vessel may be delayed in loading and discharging. The aggregate time allowed for loading and discharging becomes the lay days, which, with costs, form the basis for establishing the freight to be charged.* Accordingly, it may be said that, conceptually, laytime, demurrage, dispatch and dead freight are functions of cost and, perhaps more aptly, that each is a function of freight. (Burke, *Voyage Charters-Special Problems*, 49 Tulane Law Review 935, 935-6 (1975). (emphasis added).

Or, as is defined in Gilmore & Black, *The Law of Admiralty* at 211 (2d ed. 1975): ". . . these clauses embody *an agreement* as to what is to be taken as a *reasonable rate* of loading or unloading . . .".

Atlantic argues from the sales order and the Zegarra deposition that the receivers wanted the cargo "shipped as soon as possible" to support its speculation of expedited loading and unloading in its calculation of anticipated net profits. Actually the sales order incorporated charter party stipulations concerning time for unloading and exclusion of weekends and holidays (page 3, English translation A. 176a). Moreover, it must be emphasized that Atlantic had no knowledge of such matters *at the time of the alleged breach of contract,* and in accepting the business at the stipulated freight, it did not, and indeed *could not* have, assumed the MARY would load or unload in less than the allowed laydays. Simply stated, the anticipated

net profits, to the extent alleged by Atlantic, were not in the contemplation of the parties at the time of the making of the alleged contract, and are not recoverable by Atlantic.

In *Intercontinental Transportation Co. Inc.* v. *The India Supply Mission*, *supra*, on facts even more compelling than in this case, the Court rejected a similar argument. There, a charter party stipulated that a vessel be allowed 8 days for loading, and she also was to load "with customary berth despatch." Although the vessel loaded in 6 days, the plaintiff claimed demurrage on the ground that loading took 3.7 days longer than customary berth despatch. The Court held that despite the parties stipulation to unload with customary berth despatch, this was inconsistent with the provision setting fixed laytime, and that the latter prevailed. Plaintiff was allowed the full 6 days, and since this fell within the allotted laytime of 8 days, the Court found no liability.

Tidewater submits this reasoning is even more compelling here, where Atlantic relies on a *sales order to which it was not a party and had no knowledge of* during the events in question, assuming *arguendo* that the sales order supported Atlantic's contention, which it does not. Atlantic should not be permitted to assert these grounds in contravention of Tidewater's right to utilize the full laytime allowed and days excluded under the charter stipulations.

With regard to the issue of Atlantic's mitigation of damages, Tidewater must point out that the MARY made a long voyage in ballast from the St. Croix to Halifax, and ultimately voyages to New Jersey, and then from Mobile to Matanzas, which resulted in no profit. Tidewater questions why Atlantic undertook these voyages when by its own admission (Appellee's Brief, p. 28), it allegedly had business for the MARY in Chimbote. It can be seen by simply glancing at a map that Chimbote is no farther from St. Croix than Halifax is, yet Atlantic ignored what it

contends was potential profitable business out of Chimbote in favor of two voyages where it lost money. Atlantic cannot have it both ways. If there was business in Chimbote, then it failed to mitigate damages in a reasonable manner. If there was no such business, then Tidewater has properly included the ballast leg back from Chimbote to the U.S. Gulf in its estimate of voyage expenses.

CONCLUSION

It is respectfully submitted that the order and judgment of the District Court granting Appellee damages should be reversed and the complaint dismissed, with costs to Appellant.

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June 30, 1977

Respectfully submitted,

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Service of three (3) copies of
the within Reply Brief is
hereby admitted this 30th day
of June, 1937.

Attorney for Defendant Kennedy